claim and on the counterclaim. He was awarded costs on the county court scale on both the claim and counterclaim and the case went on appeal on the basis that the plaintiff was entitled to costs on the High Court scale on the counterclaim. Lord Esher M.R. in his judgment said that the claim and counterclaim must, although they were included in one action, be treated for the purposes of taxation as separate actions, and that being the case, the counterclaim could not be within O. 65 r. 12. Bowen L.J. (on p. 548) said that

> "A counter-claim is therefore to be treated, for all purposes for which justice requires it to be so treated, as an indepedent action."

That passage has been cited verbatim in the *Annual Practice* (1963 edn. pp. 452-453) and in *Mallal's* Supreme Court Practice (at p. 290). That was the passage adopted by counsel. If *Amon* v. *Bobbett, supra,* was advanced as a proposition that the appellant's counterclaim should be dealt with in an independent action, I can find no justification for that contention. That case merely propounds the law in general terms. To say that that case laid down the proposition that in this or in any other case a counterclaim must be dealt with in an independent action is not only to run counter to the decision in that case but also to fetter the exercise of discretion conferred by O. 21 r. 15. I accept *Amon* v. *Bobbett, supra,* insofar as it elucidates the general principle that a counterclaim is an independent action. The essential difference between a counterclaim and a set-off is that a counterclaim does not operate merely as a defence but as an independent action enabling the defendant to obtain a julgment against the plaintiff and to recover any balance due to him or any other relief to which he is entitled. Since it is an independent action, the defendant may prosecute it although the plaintiff's action is for some reason stayed, discontinued, or dismissed (O. 21 r. 16). It is not so with set-off because it is merely a defence and not an independent action and therefore the defendant cannot claim to have his set-off tried if for some reason the plaintiff's claim is discontinued. See *Stooke* v. *Taylor, supra.*

It was said in *Piercy* v. *Young* [16] that where the issues raised by the claim and counterclaim arose out of the same subject matter, both the claims should be tried together as that was the defendant's object in pleading the counterclaim. Separate trials on separate issues are nearly as expensive as separate actions and ought certainly not to be encouraged, and they should only be granted on special grounds. Parker L.J. (as he then was) in *Baylis Baxter Ltd.* v. *Sabath* [17] seems to be of the view that where the counterclaim amounts to an equitable set-off it is right that the judge should deal with the claim and counterclaim as one. *Odgers* on Pleading & Practice (18th edn.) on page 215 states:—

> "If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim."

To my mind those are observations which may influence a judge in the exercise of his discretion under O. 21 r. 15. They cannot be said to lay down any principle whatever, for once a principle is laid down, it ceases to be a discretion and becomes a rule of law. As was said by Brown L.J. in the case of *Jones* v. *Curling*:— [18]

> "I have always entertained the strongest opinion that the court would be acting *ultra vires* if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms."

Had the learned judge given reasons for his decision, I might have been prepared to agree with him. But since no reason was given it is difficult to escape from the conclusion that he had arrived at his decision arbitrarily.

Giving the best consideration I can in the matter, in the absence of any reason given by the learned judge, I am of the opinion that this is a proper case to exercise the discretion in favour of the appellants for ordering the counterclaim to be disposed of in the same action as that of the respondents. I would therefore allow the appeal with costs. That means the appellants are given unconditional leave to defend and to prosecute their counterclaim in the same action as the respondents' claim.

Barakbah L.P. and **Azmi C.J.** concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Kam Woon Wah & Co.*

CHOW SIEW WOH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 7, 1967]

[K.L. — Federal Court Criminal Appeal No. X.34 of 1966]

Criminal Law and Procedure — Evidence — Dying statement — Not produced at trial — Misdirection — Criminal Procedure Code (S.S. Cap. 21), s. 124(3).

Penal Code, s. 32 — Murder — Misdirection or non-direction.

This was an appeal against the conviction of the appellant for murder. The deceased made a dying statement which was recorded by the police but this was not produced in evidence. It was also alleged on appeal that the trial judge had misdirected the jury on an alleged suicide attempt by the appellant, when the evidence did not support the allegation.

Held: because of the misdirection or non-direction as to the alleged suicide attempt and the non-production of the best available evidence, to wit, the dying statement, the verdict of the lower court cannot stand and the conviction must be quashed.

FEDERAL COURT.

Jag Jit Singh for the appellant.

Suhaimi bin Dato' Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye F.J.: The special jury, by a majority of 6 to 1 found the appellant guilty of murder for which he was sentenced to death under section 302 of the Penal Code. We allowed the appeal on grounds which we stated would be delivered later. We now do so.

At about 8.30 p.m. on May 7, 1966 the deceased, Lee Gaik Lan, was stabbed in the abdomen as she was leaving the Rex Tailor Shop, No. 12 Brick Kiln Road, Penang, where she was employed as a seamstress. Her assailant was a man dressed in a red shirt, who had only paused to strike before running away.

The girl was taken to the hospital and there she was visited on the following day by her uncle, Lim Choo Ling, at about 11.30 a.m., and by her brother, Lee Kit Min, at about 1 p.m. To these two persons respectively she named her assailant as "Chow Seow Foh" and "Chow Siew Woh". To the uncle the name was that of a stranger, but the brother claimed that he knew whom she referred to because the appellant had visited him in Changloon a fortnight earlier and introduced himself as a person interested in taking the deceased to Kuala Lumpur for training as a midwife in order to remove her from bad company in Penang. Incidentally, the deceased was found at the post-mortem examination to have been 8 to 10 weeks pregnant, a point not entirely without significance if her brother and uncle thought the appellant responsible for her condition. The brother admitted that he knew, through the Chinese press, of her pregnancy.

The deceased succumbed to her injury 10 days after the wounding.

The appellant was a textiles salesman, 19 years old, living with his mother, brothers and sisters at No. 63, Kuala Kangsar Road, about half-a-mile from the tailor-shop. He and the deceased were friends, clearly more than casual acquaintances, because there was ample evidence that he had come to the shop to see her on a number of occasions which had nothing to do with canvassing for business. There was also evidence of another seamstress, Chang Ah Lin, working for the same employers, that the appellant used to visit the deceased at the lodgings shared by the two girls. Their relations were cordial.

On the evening of May 7, it was common ground that the appellant spent some time in conversation with the deceased between 7 p.m. and 8 p.m. when he left. It was also not challenged that he was then wearing a red Hawaiian shirt.

Half-an-hour later, as the deceased left the shop in the company of three other girls, a man in a red shirt suddenly came up, unobserved in his approach, who stabbed her once in the abdomen and ran away. Hearing her cry of pain, Cheng Voon Thean, one of her employers, went to her assistance and was immediately joined by his partner, Phang Kim Hai. Chong saw a man in a red shirt running away and he asked the deceased who had stabbed her but she did not say anything in reply then or later, while awaiting the ambulance. Phang was too late, however, to see the assailant. Of the three girls who were in the company of the deceased, those who were close enough to see and recognise the appellant, if he were the assailant, failed to recognise him, any more than did Chong Voon Thean.

The appellant's statement from the dock, in his own defence, was short and to the point: yes, he knew the deceased and he had held conversation with her till 8 p.m. but, after his departure, he knew nothing of what subsequently happened to her because he had then gone for supper at the Kuala Kangsar Road Market, which subsequently brought on the stomach-ache that explained his being taken, according to the prosecution evidence, to hospital shortly after the deceased's admission.

In the light of the evidence on both sides, as summarised above, the trial judge was, of course, quite correct in directing the jury that the only important question they had to determine was whether or not they believed the dying statement which the deceased was alleged to have made to her uncle and brother. As he put it to them:—

> "You have the deceased's statement that he (i.e. the appellant) was there. You have to decide for yourselves obviously — is he the person who stabbed the accused?"

And if they did, the evidence given by other witnesses as to the colour of the assailant's shirt would "support the statement of the deceased" to her two relatives.

The answer to this apparently simple question, however, involved the necessity of closely scrutinising the evidence of surrounding circumstances. And unless those circumstances were placed fairly and properly before the jury, the possibility arises of such non-direction as may be tantamount to misdirection.

In the first place, the prosecution had made much of what was described by the probationary inspector as a suicide attempt on the part of the appellant. In his address the deputy public prosecutor referred to it twice, namely, in relation to the appellant's subsequent conduct, that he was found in pain, and that the appellant, having left the tailor shop at 8 p.m., was found ill at 9.20 p.m. The inference the jury were required to draw is quite obvious. What else but remorse or consciousness of guilt? The

directions of the judge on this point were:—

"You have heard his defence and you have to consider his defence and why he was sent to hospital. His explanation was that because he had taken some 'koay-teow' in a market at the relevant time and had a stomach-ache. You will remember that after he returned from work between 6 and 7 p.m. he had taken his evening meal. You have to consider how far you believe the accused."

On this point two observations are called for. First, the chemist, Jitendar Singh Gill, gave evidence of analysing 685 millilitres of a stomach wash-out and two seed-pods of a plant of the strychnos genus said to have been found in the appellant's house. There was, however, no trace of strychnine or brusin in the stomach contents of the appellant and consequently no connection between his stomach-ache and the seed-pods. Self-administered poisoning being thus ruled out, the probationary inspector's suggestion of attempted suicide — which was nothing more than hearsay or opinion — was clearly unsupported by any evidence. This fact ought to have been brought to the attention of the jury who should have been directed to remove from their minds any impression they might have received from the prosecution of a suicide attempt and its connection with the wounding of the deceased. Had this been done, it is clearly impossible for us to say that the jury would nevertheless have come to the verdict they did.

In the second place, there is the question whether the best evidence had been produced by the prosecution — as it should have been done — of the deceased's identification of the appellant as her assailant. It is true the investigating officer, probationary inspector Nika Gurudial Singh, did say, in answer to the jury, that he took statements from the deceased at about 4.45 p.m. on May 9 and that he had testified to arresting the appellant at his house at 5 p.m. the same day, and the latter was charged the following day with an offence under section 326 of the Penal Code. Production of the statement by the deceased, however, was the best evidence of its contents and yet it was not produced and nothing on the record shows why it had been held back. It is not open to the jury or this court to jump to any conclusions as to what the deceased said therein, because it would be mere speculation to do so. For instance, the statement might have been in terms of real doubt in the nature of a guess hazarded by her as to the identity of her assailant. It is to be remembered that she did not reveal such identity when pointedly asked about it by her employer, Chong Voon Thean. There was no medical evidence that she was, immediately after the wounding, in such a state of shock that she was speechless, although it is true that she was "drowsy and in a state of shock" on admission into the General Hospital about 45 minutes later. Her inability to talk on admission into hospital, after shock had had time to take effect, does not necessarily mean that she was unable to say a word immediately after the wounding. The judge's directions on this point perhaps were not as happily worded as they might have been.

When, therefore, it is remembered that the dying statement to the probationary inspector was not produced — and it is expressly provided in section 124(3) of the (S.S.) Criminal Procedure Code [1] that such a statement was admissible — the evidence of the deceased's uncle and brother could only have been next best and, what was even more important, their evidence, even if expressed with conviction, might have been open to contradiction by the statement taken down in writing by the inspector. The weight of their testimony must again be whittled down by their failure to report the identity of the deceased's assailant until after her death, nine days after their discovery of the fact from the mouth of the deceased. They had not come forward with this information until May 17, according to the probationary inspector. It may be only a trivial additional point in this connection, but the girl and her uncle and brother were all Hakkas and yet, why should she have pronounced the name of the appellant in Hakka to her uncle and in Cantonese to her brother?

Finally, we think it not out of place to point out two other facts which appeared to have been omitted in the directions and which were in favour of the appellant. The conversation between the appellant and the deceased in the confined space of the shop shortly before the attack on the latter was apparently cordial and nothing out of the ordinary, otherwise it should have attracted some attention, which it did not. Hence there was no evidence whatsoever, or even a suggestion, of any motive for the dastardly attack by the appellant on one to whom he had just paid a friendly call. Was it not equally probable that some unrequited lover or admirer might have struck at her out of jealousy or revenge and even more probable that the assailant was impelled by some such motive than that she should have been attacked by one with whom she was on terms of friendship?

For the reasons above-stated, namely, misdirection or non-direction as to the alleged suicide attempt, and also, the non-production of the best available evidence, we had been satisfied that the verdict ought not to stand. We accordingly allowed the appeal and quashed the conviction.

Appeal allowed.